In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 374.

JOHN F. DICE,

Petitioner,

v.

THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE RESPONDENT.

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OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 155 Ohio State Reports 185, 98 N. E. 2d 301. The opinions of the Court of Appeals of Summit County, Ohio, the intermediate appellate court, and of the Common Pleas Court of Summit County, Ohio, the trial court, both unreported, are appended to petitioner's brief.

JURISDICTION.

Petitioner duly filed a petition for a writ of certiorari to the Supreme Court of Ohio invoking jurisdiction under Section 929 (3) of the Judiciary Act of June 25, 1948, 28 U. S. C. 1257 (3), which was granted October 8, 1951.

QUESTIONS PRESENTED.

1. Did the Supreme Court of Ohio err in deciding that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio courts by the law of Ohio?

2. Did the Supreme Court of Ohio err in deciding (a) that the trial court (the Common Pleas Court) had the right to determine the issue as to whether petitioner was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under said Act, and (b) that there was substantial evidence to support the trial court's finding that the facts did not sustain, either in law or in equity, the allegations of fraud by clear, unequivocal and convincing evidence?

At page 4 of his brief, under the heading "Questions Presented," petitioner states that two primary or fundamental questions are presented, in both of which he assumes that there is fraud in the factum and fraud in the inducement. None of the Ohio courts found any fraud in the factum. Respondent submits there is no basis in the record or in the decisions of the three Ohio courts for a claim of fraud in the factum.

STATUTES INVOLVED.

Section 51 of the Federal Employers' Liability Act, Title 45 U. S. C.; Section 1652, The Rules of Decision Act, Title 28 U. S. C.

Petitioner's brief (p. 5) also includes, under the heading "Statutes Involved," Section 55 of the Federal Employers' Liability Act and Section 688 of the Jones (Merchant Marine) Act, Title 46 U. S. C. However, Section 688 is not involved, and Section 55 is not controlling, as will hereafter appear.

HISTORY.

Since a statement of the course taken by the proceedings in the state courts, as well as of the facts, becomes necessary to determine whether the judgment of the Ohio Supreme Court should be affirmed by this Court, attention is directed thereto.

On May 21, 1947, petitioner commenced an action in the Common Pleas Court of Summit County, Ohio, against respondent, to recover $50,200.00 for personal injuries and expenses, arising out of an accident which occurred on May 29, 1944, when a locomotive, upon which he was working as a fireman, was derailed. He described his injuries as:

> "bruises and contusions all over his entire body, particularly in the region of his lower left abdomen (or groin); internal injuries and severe traumatic shock;" (R. 2).

Respondent's answer admitted that at the time of accident the parties were engaged in interstate commerce; there was a derailment of the locomotive upon which petitioner was engaged as a fireman; and that he sustained some injuries, but denied any negligence upon its part. As a second defense it pleaded an agreement and release dated September 5, 1944, executed by petitioner, and payment of $924.63 to petitioner as a full and complete settlement and release of petitioner's claims. (See Pet. Ex. 6; R. 5-7, 165; and Resp. Ex. 18; R. 147, 274-275.) On August 4, 1947, petitioner filed a reply alleging facts which he contended made the release null and void (R. 8-9).

The cause came on for trial on May 29, 1949 and the jury, after long deliberation, was discharged because of failure to reach a verdict (R. 16-17). During trial and over objection, petitioner filed an amended reply in which he said (R. 10-11):

"Plaintiff admits that in September, 1944 he received some money from the defendant, the exact amount thereof being particularly within the knowledge of the defendant, but denies that the receipt thereof constituted a full and complete settlement of all of his claims against the defendant company. Plaintiff says that in September, 1944 when he reported back to work, one A. W. Hockberg, Chief Clerk for the defendant company, informed him that it would be necessary to sign a paper releasing the defendant company from all claims for loss of time and medical expenses up to that date before he could go back to work and that he relied on said promises and representations.

* * * * *

"By way of further reply, this plaintiff says that at the time of the execution of said purported release, he had no knowledge that said release was a full and complete release of all of his claims against the defendant corporation, but says that one, A. W. Hockberg, Chief Clerk of the defendant corporation, represented to this plaintiff that said purported release was a release only for the wages lost by this plaintiff to the date thereof, by reason of his being unable to work by reason of the injuries he had sustained on or about May 29th, 1944, and that said representation was false, fraudulent and was relied on by the plaintiff."

The history of the case upon and subsequent to retrial is correctly stated by petitioner, but in connection therewith, respondent wishes to add that the jury with its general verdict, made special findings, including the following (R. 19-20):

Question: If you find in favor of the plaintiff on the issue with respect to the validity of the "agreement and release" of September 5, 1944 (Exhibit 6), then state and describe the act or acts of defendant, upon which you base such finding.

Answer: We, of the jury, consider Exhibit 8 null and void since the defendant did not adhere to the validity of the "agreement and release," known as Exhibit 8, therefore, reopening the situation by continuing to make payments to the plaintiff. We find Exhibit 6 invalid because of conflicting dates Sept. 5th and Sept. 9th, 1944.

STATEMENT OF THE CASE.

On May 29, 1944 at 10:08 A. M., petitioner, then fifty (50) years of age, and an experienced railroad fireman, was riding in the cab on the left side of a steam locomotive traveling westerly, about thirty (30) to thirty-five (35) miles per hour, as it approached Rushmore, Ohio (R. 40, 41, 103). For some unknown reason the locomotive was derailed near a switch or frog, coming to a standstill on its right side (R. 43, 187, 210). Petitioner was thrown and bounced around in the cab and then crawled out of the window of the upturned left side of the engine (R. 46-47). He remained there a short while, then walked unassisted about one-fourth mile, to a highway, then was driven in an automobile to a doctor's office where he received first aid (R. 48). He then went to a bar and had some beer, and then to his rooming house, where he slept several hours (R. 48-49). He then had his supper (R. 49) and again went to a bar where he had some more beer (R. 49, 109-110). Later that evening he was driven in an automobile from Delphos, Ohio, to the East Akron yard of respondent, a distance of 167 miles,—where he got his own car and drove about two miles to his home, then to bed (R. 49-50, 110).

The next day, around 12:40 P. M., petitioner, at the request of respondent's doctor, went to the Akron City Hospital for observation, where he remained until June 2nd, 1944 at 2:30 P. M. (R. 110-111). An examination

revealed some "multiple con usions" (none on the left abdomen) (Pet. Ex. 5; R. 123). An X-ray examination of the cervical spine showed "definite osteo-arthritic changes of the mid-cervical spine with an increase of the usual lordotic curve," but "no evidence of fracture or dislocation," and "there was no evidence of any fractured ribs." His condition on discharge was "good" (Pet. Ex. 5; R. 123).

On June 13, 1944, he was again examined by respondent's doctor and O.K.'d to go back to work (R. 112). He returned to work on June 15th and worked the rest of that month and also on July 1st, 3rd and 4th (R. 112). He then consulted his own doctor, Dr. B. W. Shaffner (deceased at time of retrial), and also Dr. E. M. Walker (R. 113). Dr. Shaffner had him return to the hospital on July 17, 18 and 19, 1944, for X-ray examinations of the upper gastro-intestinal tract and colon, which were negative (R. 112, 221, 222; Resp. Ex. 11; R. 222, 273). On July 31, 1944, respondent received Dr. Walker's negative report (Resp. Ex. 11; R. 222, 273).

On August 31, 1944, petitioner again saw Dr. Shaffner, who released him to return to work on September 5, 1944, which release was personally taken by petitioner to respondent's main office (Resp. Ex. 16; R. 113, 274). He returned to work on September 7, 1944 and worked the rest of that year, except for a granted vacation of six days (R. 114). He worked throughout 1945, with earnings of $2569.35; 1946, with earnings of $2781.04; and up until April 24, 1947, with earnings of $894.02, *at which time he voluntarily quit* (Resp. Exs. 35-A to 35-N; R. 114-115, 117, 157, 238, 275). Petitioner said he was off work a total of 135 days between May 29, 1944 and April 25, 1947, but did not say that this was due to physical disability. Petitioner was on the extra board (low in seniority) at time of accident and continued thereon to the time he terminated his employment (R. 101).

On June 14, 1944, petitioner went to respondent's office with his longhand statement for $84.19 for damage or loss of personal property sustained in the accident (Resp. Ex. 5; R. 217, 271), and asked that the same be paid, which was then paid by check, later endorsed by him (Resp. Ex. 6; R. 217, 272). On the same date, he received another check for $139.66, later endorsed by him (Resp. Ex. 7; R. 219, 272), which had on its face the following: *"In full settlement for injuries received at Rushmore, 10:08 A. M. May 29, 1944." At that time he signed in duplicate an "agreement and release" with his signature affixed thereon in six different places* (Resp. Exs. 8, 8a; R. 220, 272).

On August 8, 1944, he went to respondent's office, after having consulted his own doctors and having further X-rays taken, and again asked for and received a check for $75.00, later endorsed by him, which had on its face the following: "For additional partial settlement of personal injuries received at Rushmore, 10:08 A. M. on May 29, 1944" (Resp. Ex. 9; R. 221, 272); and he also signed a separate receipt (Resp. Ex. 10; R. 221, 272).

On August 14 and 28, 1944, he went to respondent's office and on each occasion requested and received a $75.00 check, later endorsed by him, each of which had on its face the same notation as the check of August 8, 1944; and he also signed a separate receipt (Resp. Exs. 12a, 13, 14, 15; R. 218, 223, 224, 273, 274).

On September 5, 1944, petitioner went to the office of A. W. Hochberg, Chief Clerk. *At this time petitioner gave to Mr. Hochberg, Dr. Shaffner's O.K. to return to work* (Resp. Ex. 16; R. 113, 114, 274), *and told him "I'm ready to go back to work"* (R. 133-134). *Whereupon, after about an hour, an "agreement and release" was prepared, and was signed in duplicate by petitioner in six separate places*

(Pet. Ex. 6; Resp. Ex. 18; R. 5, 125, 146, 147, 165, 274). Petitioner was then given a check for $475.78, later endorsed by him, which had on its face: *"In full settlement account of injury received at Rushmore, Ohio, 10:08 A. M. on May 29, 1944"* (R. 148-151). On the back of the check and above the petitioner's endorsement appeared the following: *"This voucher check is a payment in full of the within account, and it is agreed that the payee's endorsement thereon shall constitute the acknowledgment of such payment."* (Resp. Ex. 13; R. 273.) Petitioner had this check in his possession for about twenty-four hours before he cashed it (R. 150).

The conversation between petitioner and Hochberg appears in the record at pages 128 to 149, inclusive, 153, 234, 236, 252, 257, 258, 262.

Petitioner's 1944 wages amounted to $2476.92, of which $191.56 was withheld for income tax, as evidenced by a required withholding receipt, Form W2 (Resp. Ex. 39; R. 227, 275). This amount did not include the $924.63, and petitioner did not pay any income tax on the same, nor did respondent report or withhold anything therefrom under the Railroad Retirement Act (Resp. Exs. P. R. 1 to P. R. 21; R. 228-229, 238-239, 275). Petitioner's 1944 pay checks (Resp. Exs. P. C. 1 to P. C. 22; R. 225, 275) differed in form, language and style from those used in payment of the $924.63. His pay checks had stubs showing total earnings and deductions therefrom, but the others had no such stubs (R. 237).

Under an agreement between respondent and the firemen's union (Resp. Exs. 24 and 24a; R. 265, 267, 275), petitioner was required to take certain examinations for promotion to engineman, and if he failed to pass he went to the foot of the firemen's roster (R. 94). Petitioner, before April 24, 1947, had passed the oral part thereof (R.

94), and on that date started to take the written part of the examination, but quit before it was finished (Resp. Ex. 27; R. 156-157, 275). He never made any request to complete the examination, nor has he been denied an opportunity to complete it. He started this action on May 21, 1947 (R. 157). At no time prior to the time of the filing of his first reply, to-wit: August 4, 1947, did he ever complain of or charge anyone connected with the respondent of any fraud, misrepresentation, or breach of any promises, nor did he offer to make any tender of any of the $924.63 until after the filing of respondent's answer (R. 157, 276-277).

Petitioner said (R. 139, 147-149, 150, 151, 153, 218, 221, 223) that he did not read what he signed, notwithstanding he affixed his signature fifteen times to agreements, releases and receipts and endorsed six checks.

The record does not show that petitioner could not read or write, did not have an opportunity to read, could not see to read, or was prevented from reading. (See special findings by jury, R. 19, 20.) There was no evidence that petitioner in September, 1944, was mistaken as to the nature and extent of any injury he had received or that he went back to work under any mistake of fact, either on his part or on the part of respondent, or upon any false promises by respondent. There was no evidence that he was not informed or that he was misinformed about his physical condition in September, 1944. He was not induced to go back to work at the request of the respondent. He made no statement with regard to any undisclosed physical condition. There was no competent evidence that the "tumerous mass in the lower left groin" or the "neurosis" as found by his doctor on May 1, 1949, was a direct and proximate result of the accident of May 29, 1944, nor that he had such a condition in September, 1944 (R. 62,

67, 68). There was no evidence that in September, 1944, petitioner was suffering from a substantial or severe injury from which recovery was doubtful.

The record does not show that the derailment was due to any negligence. Respondent, after investigation, was unable to determine the cause of derailment and so reported to the Interstate Commerce Commission (R. 210). Respondent offered evidence of its various inspections and care in the maintenance of equipment, etc. and the operation of the train (R. 165-217). The jury, by its special findings, found no evidence of negligence except "that the plaintiff did not have immediate and proper hospital care" (R. 20-21; Questions 6 and 7). The case was submitted to the jury under the rule of *res ipsa loquitur* (R. 302-303).

ARGUMENT.

Summary.

1. Neither the common law, nor the Federal or Ohio statutory law (a) prohibits an agreement of the kind and character executed by petitioner, or (b) provides that such an agreement stands on a different basis than the agreements of others. Questions as to the validity or avoidance of such an agreement are to be determined by the common law of the forum where the agreement was made, and the federal courts are bound to follow the decisions of the appropriate state court. There is no federal general common law.

The validity of such an agreement does not depend upon the Federal Employers' Liability Act and applicable principles of common law as interpreted by federal courts, to the exclusion of the law of the State in which the agreement was made. Such applicable principles are to be found exclusively in the law of the forum.

Such an agreement is not a device to exempt from liability under Section 55 of the Federal Employers' Liability Act, but is a means of compromising a claimed liability. The Jones Act has no application, since the wardship theory of seamen has not been extended to non-maritime employees.

Questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio courts by the law of Ohio.

2. Public policy favors settlement of controversies as conducive to termination of litigation, and a release is a means of comprising a claimed liability. In determining the validity of a release, both Federal and Ohio courts have

distinguished between fraud in the factum and fraud in the inducement. Section 55 of the Federal Employers' Liability Act does not prohibit or render invalid an agreement of the kind and character executed by petitioner, nor does it wipe out the distinction between a void release and a voidable release.

The circumstances of the execution of petitioner's release of September 5, 1944 do not support any claim of fraud in the factum. Petitioner did not sustain the burden of establishing his claim of fraud in any respect by clear, unequivocal, satisfactory and convincing evidence. He was bound by the terms of the release, as he could read, had an opportunity to read, and was not prevented from reading. Petitioner's conduct showed a lack of care and diligence precluding his claim of fraud and misrepresentation.

The action of the trial court did not impinge upon the limitations of the Seventh Amendment to the Constitution of the United States.

Where an equitable defense is interposed to a suit at law the equitable issue should be first disposed of as in a court of equity, and if an issue of law remains, it is triable to a jury. Under Ohio law, if a release is not void but only voidable, the releasor cannot maintain an action for the original wrong until the release is set aside. Under both Ohio and Federal decisions, the action of the jury on the question of the validity of petitioner's release was not binding upon the court, and the court had the right to consider all the evidence and the special findings of the jury as advisory and enter judgment accordingly.

The jury's findings of fact did not indicate that respondent was guilty of fraud or misrepresentation, as charged, and such findings were of no force and effect in support of the general verdict of the jury.

The Ohio courts, in upholding the release, did not do so under any local rule of practice or procedure but followed the substantive law of Ohio.

The decision of the Ohio Supreme Court is controlling and should be upheld under the provisions of the Federal Rules of Decision Act. The fact that petitioner's release was of a right given by a Federal statute did not preclude the Supreme Court of Ohio from determining the validity of such release under the applicable State law.

I. The Supreme Court of Ohio correctly decided that questions as to the legal effect upon a right under the Federal Employers' Liability Act of a release executed in Ohio and questions as to the avoidance of such a release are to be determined in the Ohio Courts by the law of Ohio.

Neither the common law, as interpreted by Federal or Ohio courts, nor the Federal or Ohio statutory law, prohibits a railroad employee, suffering injury while employed by a common carrier by railroad, from entering into an agreement with such carrier, adjusting, compromising or settling a claim for damages for such injury. There is nothing in the common law, as interpreted by Federal or Ohio courts, nor in Federal or Ohio statutory law, holding or providing that such an agreement stands on a different basis, or that the validity thereof is to be determined by different standards, than the agreements of others. Nor is there any Federal or Ohio law prescribing the form or execution of such an agreement.

In *Erie R. Co. v. Tompkins*, 304 U. S. 64, it is said at page 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the

> law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal courts."

It follows from the foregoing that questions related to the validity or avoidance of such an agreement are to be determined by the law of the forum (the State) where that agreement was made.

Regardless of whether the question of the applicability of the state law arises in an action at law or in a suit in equity, the Federal courts are bound to follow the decisions of the appropriate state court, even in the absence of state statute. *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202, 205.

Petitioner in the first heading of his Argument (p. 12) states his contention that the validity of such a release is controlled by the law as found and interpreted by Federal courts, and not the law of the forum. Later on the same page he states that in order to secure uniformity in the administration of rights and obligations arising under the Federal Employers' Liability Act, it has been the policy of this Court that Federal Court decisions should control, both as to the interpretation of the Act and as to the applicable common law. However, as petitioner admits, the two decisions of this Court there cited as announcing this policy did not involve the validity of a release. Such policy does not comprehend the proposition that the validity of an agreement of adjustment, compromise or settlement of claims for personal injury arising under the Act depends upon the Act and applicable principles of common

law as interpreted by Federal courts, to the exclusion of the law of the state in which such agreement was made. Where are such applicable principles of common law found? In the absence of statute or Federal general common law, are they not found in the state where such an agreement was made?

The reasoning of this Court in *Erie Railroad Company v. Tompkins, supra,* requires the conclusion that such applicable principles of common law are to be exclusively found in the state of the forum, the place of agreement.

Petitioner's contention presupposes that the common law of release has some Federal source, as distinguished from a State source, and that there is a difference between the two. Under this argument this Court is asked to decide that the release of a railroad employee stands on a different basis than the releases of others. This was urged and rejected in *Callen v. Pennsylvania Railroad Company,* 332 U. S. 625, a case involving the question of the validity of the release of a railroad brakeman and the burden of establishing its validity. Mr. Justice JACKSON, delivering the opinion of the court, said (p. 630):

> "If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

Petitioner's contentions, and the cases upon which he relies, spring largely from the concurring opinion of Circuit Judge Frank in *Ricketts v. Pennsylvania Railroad*

Company, (CCA 2) 153 F. 2d 757. Judge Hand's opinion in that case was based upon the question of the extent of the authority of Ricketts' attorney and not upon any question of fraud. In his concurring opinion, Judge Frank attempts to apply to non-maritime employees the law relative to maritime employees, particularly as laid down in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239. But the only question before this Court in that case was one of burden of proof, and it is significant that Mr. Justice Black, who delivered the opinion, pointed out (p. 243) that it was not a case in which there was an effort of the state court to enforce rights claimed to be rooted in state law.

It is interesting to note the more recent views of Circuit Judge Frank in *Heagney v. Brooklyn Eastern District Terminal*, 190 F. 2d 976 (2nd Circuit 1951), as stated in his dissenting opinion (pp. 980, 982):

> "Undoubtedly, an employee, like plaintiff, can effectively, for a consideration, release his rights under the federal statutes (although the Supreme Court, construing §5 of F. E. L. A., requires that such a release be most carefully scrutinized). * * *"
>
> * * * * *
>
> "I am not saying that the State's legal rules (statutory or otherwise) concerning releases, compromises, or accords and satisfactions do not apply to plaintiff's rights under the federal statutes."

In his majority opinion in that case Judge Clark follows the holding of the *Callen* case in saying, at page 979:

> "It is thus clear that 'a full compromise enabling the parties to settle their dispute without litigation' is appropriate and valid."

Petitioner cites the cases of *Thompson v. Camp*, 163 F. 2d 396; *Brown v. Pennsylvania Railroad Co.*, 158 F. 2d 795; and *Irish v. Central Vermont Ry., Inc.*, 164 F. 2d 837,

which cited and followed the opinion of Judge Frank in the *Ricketts* case; but these were decided before the *Callen* case, *supra*. The cases of *Graham v. Atchison, Topeka and Santa Fe Railway Company*, 176 F. 2d 819, and *Chicago & N. W. Ry. Co. v. Curl*, 178 F. 2d 497, as well as the Utah case of *Kirchgestner v. Denver & R. G. W. R. Co.*, 218 P. 2d 685, also cited by petitioner, were decided after the *Callen* case, but they are distinguishable from the instant case in that they involved the question of mutual mistake, and not questions of fraud or misrepresentation, or applicability of State or Federal law. The California cases of *Union Pacific Railroad Co. v. Zimmer*, 87 Cal. App. 2d 524, 197 P. 2d 363 and *Pacific Electric Ry. Co. v. Dewey*, 95 Cal. App. 2d 69, 212 P. 2d 255, cited by petitioner, were suits for declaratory judgments under state procedure and involved only the question of mutual mistake. Factually all of these cases are clearly distinguishable from the instant case.

Obviously, mutual mistake does not contain all of the elements common to fraudulent misrepresentations. The classic statement of those elements is found at pages 249-250 of this Court's opinion in *Southern Development Co. v. Silva*, 125 U. S. 247, as follows:

> "The burden of proof is on the complainant, and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof—
>
> "*First*. That the defendant has made a representation in regard to a material *fact*;
>
> "*Secondly*. That such representation is false;
>
> "*Thirdly*. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"*Fourthly*. That it was made with intent that it should be acted on;

"*Fifthly*. That it was acted on by complainant to his damage; and,

"*Sixthly*. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

The trial court in the instant case said almost the same thing (R. 297).

Petitioner, in his brief (pp. 13-15), also states "the provisions of Section 55 of the Act would seem to require the extension of the above rule of uniformity to questions involving the validity of releases," admitting, however, "this Section does not prevent the making of 'a bona fide compromise' or settlement." He urges that "any such agreement must be interpreted or examined, to determine whether or not it impinges upon the restrictions of this Section"; and that "the principle of uniformity relative to seamen's releases would be equally applicable to railroad employees' releases, and particularly, in view of the explicit provisions of Section 55 thereof."

As to these contentions, unquestionably a court has the right to examine such an agreement to determine whether it is of a kind declared to be void by Section 55. But the desire for uniformity and the preservation of substantive rights does not permit the interpretation of Section 55 sought by petitioner. This is clearly shown by the following statement at page 630 of the majority opinion in the *Callen* case (332 U. S. 625):

"The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter, shall to that extent be void.' 35 Stat. 66, 45 U. S. C. § 55. It is obvious that a release

is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation."

The case of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (cited in petitioner's brief at pages 2, 14, 20 and 21) and the Jones Act have no application to the questions here presented since the wardship theory of seamen has not been extended to non-maritime employees.

In *Duncan v. Thompson, Trustee,* 315 U. S. 1, cited by petitioner in his brief at pages 13 and 14, the contract involved was not a compromise and settlement of claims, but only a step looking toward a settlement in the future, as pointed out by Mr. Justice Black at page 7 of the opinion. Obviously, this case has no application to the instant case.

II. The Supreme Court of Ohio correctly decided (a) that the trial court had the right to determine the issue as to whether petitioner was induced by fraud (other than fraud in the factum) or by mistake to execute a release of his claim arising under the Federal Employers' Liability Act, and (b) that there was substantial evidence to support his finding that the facts did not sustain, either in law or in equity, the allegations of fraud by clear, unequivocal and convincing evidence.

Since the petitioner attacks the opinion of the Supreme Court of Ohio in its entirety and argues (p. 19) that if the validity of the release is a jury issue "the evidence in this case is such that under federal law, as applied by federal courts" the trial court erred in sustaining respondent's motion for judgment notwithstanding the verdict of the jury, it is necessary to discuss not only the

court's conclusion that the trial court had the right to determine the issue of fraud, but its holding that there was substantial evidence to sustain the trial court's finding on that issue.

It has long been public policy to favor settlement of controversies as conducive to termination of litigation, and the recognized and common way to effect such settlements is by the parties entering into agreements of adjustment, compromise and settlement. And as Mr. Justice Jackson said in the *Callen* case, at page 630, "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility." And whether the question of such validity is for the court or the jury, in considering the validity of such an agreement the Ohio courts have consistently distinguished fraud in the factum from fraud in the inducement, and have held that fraud in the factum renders an agreement null and void, while fraud in the inducement may avoid an agreement. Judge Taft in his opinion, at pages 190 and 191, states the Ohio law and cites the leading Ohio cases on this subject, including *Picklesimer v. B. & O. R. R. Co.*, 151 O. S. 1, *Flynn v. Sharon Steel Corp.*, 142 O. S. 145, and *Perry v. O'Neil & Co.*, 78 O. S. 200. The trial court likewise cited the *Perry* and *Flynn* cases. Since the *Perry* case is a leading Ohio case, attention is directed to the following paragraphs of the syllabus:

> "1. A release of a cause of action for damages for personal injuries, that is void, is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply aver the facts that make it void; but if it is not void, but only voidable, he cannot maintain his action until the release is set aside.
>
> "3. If the execution and delivery of the release are admitted, the burden of proving it void is upon the releasor."

Petitioner, in the second heading of his Argument (p. 15), asserts that "The validity of such a release, where there are disputed facts with reference to the releasor being induced by fraud in factum and fraud in the inducement practiced by the releasee, is a jury issue," and in conjunction therewith urges that his cited decisions of the Courts of Appeals,[1] in holding that the validity of the release is a jury issue, make no distinction whatsoever between fraud in the factum, fraud in the inducement or a mutual mistake of fact. He also says that this Court has made no such distinction.

But this distinction has been long recognized by this Court and other federal courts. It is the long and firmly established rule in the national courts that issues of fraud, having to do with the execution of an instrument which the signer was led to believe was something else, are triable at law, while issues of fraud having to do with inducing execution of what the signer know to be a release, are triable in equity. Particular attention is directed to *Hartshorn v. Day*, 19 How. 211; *George v. Tate*, 102 U. S. 564; *Hill v. Northern Pacific Railway Co.*, 104 F. 754; *Union Pac. R. Co. v. Syas*, 246 F. 561, and *Pringle v. Storrow*, 9 F. 2d 464, and its citations.

This distinction is not wiped out by Section 55 of the Federal Employers' Liability Act as to releases of claims for injuries under that Act, as petitioner contends at page 16 of his brief. Section 55 says nothing about releases of compromise and settlement and does not purport to wipe out the distinction between a void release and a voidable release. See *Callen v. Pennsylvania R. R. Co.*, 332 U. S. 625, 630.

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[1] *Ricketts v. Pennsylvania R. R. Co.*, 153 F. 2d 757; *Brown v. Pennsylvania Railroad Co.*, 158 F. 2d 795; *Irish v. Central Vermont Ry.*, 164 F. 2d 837; *Chicago & N. W. Ry. Co. v. Curl*, 178 F. 2d 497.

Petitioner states (pp. 10, 17) that when on September 5, 1944 Hochberg handed him a paper Hochberg stated that this was only a release for wages lost, that petitioner would not have to read it, that the Railroad would reopen his case in the event he suffered a recurrence (all of which was denied by Hochberg); that he accepted Hochberg's invitation not to read the release; relied upon Hochberg's representations that it was for lost wages only; and had no actual knowledge that the instrument was a general release rather than a limited one for lost wages. Petitioner contends (pp. 17-20) that these circumstances amounted to fraud in the factum as well as fraud in the inducement and presented a jury issue.

These statements of petitioner and their denial by Hochberg, standing alone, simply presented a situation in which the evidence was in equipoise. The burden was upon petitioner to establish his claim of fraud by clear, unequivocal, satisfactory and convincing evidence rather than by a mere preponderance of the evidence. Fraud is never presumed. See *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 F. 437; *Merwin v. New York, N. H. & H. R. Co.*, 62 F. 2d 803; *Maxwell Land-Grant Case*, 121 U. S. 325, 381.

Petitioner's argument ignores his own neglect and failure to inform himself, as pointed out by the trial court in his finding (Petitioner's Brief, pp. 29-36). Petitioner could read, had an opportunity to read and was not prevented from reading any or all of the instruments or checks which he signed or endorsed. He was told by Hochberg that the document which was handed to him was a release (R. 234, 262). Petitioner admitted that while at Hochberg's office on September 5, 1944 he did not read or look to see what was going on there at that time (R. 146; 151).

The Court's attention is directed to petitioner's conduct in its entirety in connection with his execution of the various agreements, releases and receipts and the acceptance and endorsement of his checks, as more fully set forth in respondent's Statement of the Case, *supra*. It was not alleged, and petitioner did not prove, that he was unable to read the various instruments which he signed.

> "The law does not afford relief to one who suffers by not using the ordinary means of information, whether his neglect be attributable to indifference or credulity, nor will industrious activity in other directions, to the neglect of such means, be of any avail." *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, 647.
>
> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, 50.

See also *Slaughter's Administrator v. Gerson*, 13 Wall 379.

Other cases of similar import which upheld releases which releasor claimed he could not or did not read are:

N. Y. Cent. & H. R. R. Co. v. Difendaffer, 125 F. 893; *Wagner v. National Life Ins. Co.*, 90 F. 395; *Whitney Co. v. Johnson*, 14 F. 2d 24; *Merwin v. New York, N. H. & H. R. Co.*, 62 F. 2d 803; *Reinhardt v. Weyerhaeuser Timber Co.*, 47 F. S. 335; *Chicago, St. P., M. & O. Ry. Co. v. Bellwith*, 83 F. 437; *Heck v. Missouri Pac. Ry. Co.*, 147 F. 775; *Gladish v. Pennsylvania Co.*, 107 F. 61; *Rader v. Lehigh Valley R. Co.*, 26 F. 2d 73; *Purvis v. Pennsylvania R. Co.*,

98 F. S. 212; *Chesapeake & O. Ry. Co. v. Chaffin* (C. C. A. 4, 1950), 184 F. 2d 948. See also *Chicago & N. W. Ry. Co. v. Wilcox*, 116 F. 913.

At pages 17 to 19 of his brief, petitioner takes exception to the views of the Ohio Supreme Court on the subject of fraud in the factum, and its decision that the trial court had the right to view the case as one involving fraud in the inducement and to apply equitable principles. After commenting on petitioner's failure to read the release and the interpretation of such failure made by the Supreme Court, he says that in this aspect no equitable relief is involved since neither cancellation nor reformation is required; that in this case the single question is—was there, in fact, a contract—was there a meeting of the minds. He then urges (p. 18) that "The withdrawing of the determination of these facts from the jury impinges upon the limitations of the Seventh Amendment of the Constitution of the United States, guaranteeing the right of trial by jury in common law actions for money."

The right of trial by jury, spoken of in *Brady v. Southern Ry. Co.*, 320 U. S. 476, *Bailey v. Central Vermont Ry.*, 319 U. S. 350, and *Wilkerson v. McCarthy*, 336 U. S. 53, cited by petitioner (pp. 18, 19, 20) only applies to actions for money and not to equity actions for avoidance of a release. The Seventh Amendment does not affect equity suits. *American Life Ins. Co. v. Stewart*, 300 U. S. 203; *Connecticut General Life Ins. Co. v. Candimat Co.*, 83 F. S. 1. Petitioner's contentions ignore the well-known rule that where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and if an issue of law remains it is triable to a jury. See *Radio Corporation v. Raytheon Manufacturing Co.*, 296 U. S. 459; *Liberty Oil Co. v. Condon Bank*, 260 U. S. 235 (citing Ohio cases);

American Mills Co. v. American Surety Co., 260 U. S. 360; *Meyer v. Meyer*, 153 O. S. 408; *Picklesimer v. B. & O. R. R. Co.*, 151 O. S. 1.

The trial court was charged with the responsibility of determining whether there was any clear, unequivocal, convincing and satisfactory evidence of fraud or misrepresentation upon the part of respondent, *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 F. 437. Under both federal and state practice, the trial court had the right to determine this question upon the presentation of proper motions, both during trial and after the verdict. It is submitted that the trial court was correct in concluding that the petitioner had failed both in law and in equity to sustain his allegations of fraud by clear, unequivocal and convincing evidence. The court's action in sustaining respondent's motion for judgment notwithstanding the verdict was clearly justified and did not violate the Seventh Amendment. *Galloway v. United States*, 319 U. S. 372; *United States v. Louisiana*, 339 U. S. 699; *Brady v. Southern Ry. Co.*, 320 U. S. 476; *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573.

The Ohio law is also quite clear that if a release is not void but only voidable, the releasor cannot maintain an action for the original wrong until the release is set aside. *Perry v. O'Neil & Co.*, 78 O. S. 200; *Jackson v. Ely*, 57 O. S. 450; *Cassilly v. Cassilly*, 57 O. S. 582; *Toledo & Ohio Central Ry. Co. v. Coleman*, 12 O. C. C. (n. s.) 497, affirmed without opinion, 81 O. S. 522.

Under both Ohio and Federal decisions, the action of the jury on the question of the validity of the release was not binding upon the court and the court had the right to consider all the evidence, and the special findings of the jury as advisory, and enter judgment accordingly. *(American) Lumbermens Mutual Casualty Co. v. Timms &*

Howard Inc., 108 F. 2d 497; *Federal Reserve Bank v. Idaho, Grimm Alfalfa Seed G. Ass'n.*, 8 F. 2d, 922, certiorari denied 270 U. S. 646; *Perkins v. Prudential Ins. Co. of America*, 69 F. 2d, 218; *Idaho & Oregon Land Co. v. Bradbury*, 132 U. S. 509; *Kohn v. McNulta*, 147 U. S. 238; *Dunphy v. Kleinsmith*, 78 U. S. 610; *Perego v. Dodge*, 163 U. S. 160; *Perry v. O'Neil & Co.*, 78 O. S. 200; *Flynn v. Sharon Steel Corp.*, 142 O. S. 145.

When a court of equity calls a jury it is only for the purpose of enlightening its conscience and not to control its judgment. *Quinby v. Conlan*, 104 U. S. 420, 424; *Basey v. Gallagher*, 20 Wall. 670.

The jury's findings of fact (R. 19-20) did not indicate that respondent was guilty of fraud or misrepresentation as charged in the amended reply. The finding of the jury that the release of June 14, 1944, was null and void, "since the defendant did not adhere to the validity of the agreement and release * * * therefore, reopening the situation by continuing to make payments to the plaintiff," and its finding that the release of September 5, 1944 (Pet. Ex. 6; R. 125, 165), was "invalid because of conflicting dates September 5th and September 9th, 1944," were of no force and effect in support of the general verdict of the jury. See *C., C., C. & St. L. Ry. Co. v. Green*, 126 O. S. 512; *Stone v. New York Central Rd. Co.*, 20 O. L. A. 322; *Standard Textile Products Co. v. Pertchi*, 23 O. L. A. 70; *Litchfield v. Standard Oil Co.*, 30 O. L. A. 235; *Gunter v. Standard Oil Co.*, 60 F. 2d 389 (see also citations in opinion); *Huntington v. Toledo, St. L. & W. R. Co.*, 175 F. 532 (see also citations in opinion).

Petitioner contends (at pages 19 and 20) that if "the validity of the release is a jury issue, particularly, when there is fraud in factum, then the evidence in this case is such that under federal law, as applied by federal courts,

motions for a directed verdict or a judgment for the defendant notwithstanding the verdict of the jury in favor of the plaintiff, would have been overruled and not sustained," and further "If there is any conflict in the evidence, it is for the jury and not the court to resolve." This contention ignores the well-established rule as to the quantum of proof required to establish fraud, referred to above.

The Ohio courts in upholding the release did not do so under any rule of local practice or procedure, but followed the substantive law of Ohio. Counsel for petitioner in their brief, pages 20, 21, cite *Brown v. Western Railway of Alabama*, 338 U. S. 294, but the Ohio decisions do not conflict with the opinion of Mr. Justice Black in this case, as pointed out by Judge Taft in his opinion, 155 O. S. at page 196.

The decision of the Supreme Court of Ohio is controlling and should be upheld under the provisions of Section 1652 of The Rules of Decision Act, Title 28 U. S. C., which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The purpose of this Section is stated by Chief Justice Vinson in *King v. Order of Travelers*, 333 U. S. 153. See *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541; *Woods v. Interstate Realty Co.*, 337 U. S. 535; *Guaranty Trust Co. v. York*, 326 U. S. 99; *West v. A. T. & T. Co.*, 311 U. S. 223; *The Adour*, 21 F. 2d 858, D. C. Maryland (a stevedore's release case).

The fact that the release was of a right given by Federal statute did not preclude the Supreme Court of Ohio from determining the validity of petitioner's release under

applicable State law. *Regents of Georgia v. Carroll*, 338 U. S. 586.

CONCLUSION.

It is respectfully submitted that both the facts and the law, whether viewed as Federal or State law, require the affirmance of the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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